Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES

October Term, 1994

KENNETH K. GEORGE,

Petitioner

BETHLEHEM STEEL CORP.,

Respondent

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER OR NOT THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENIED PLAINTIFF DUE PROCESS OF LAW AND HIS RIGHT TO A FAIR TRIAL BY CONDONING THE PRACTICE IN THE EASTERN DISTRICT OF THE TRIAL COURT NOT ATTENDING VOIR DIRE, NOT EVEN BEING IN THE COURTHOUSE WHILE VOIR DIRE IS BEING CONDUCTED, NOT MAKING A RECORD OF THE VOIR DIRE QUESTIONS, AND PERMITTING THE TRIAL COURT IN ABSENTIA TO GRANT CHALLENGES FOR CAUSE BASED UPON DISCUSSIONS BETWEEN THE DEPUTY CLERK AND THE TRIAL COURT?

II. WHETHER OR NOT THE EXCLUSION OF EVIDENCE CONCERNING PROMOTION POLICIES BETWEEN JANUARY, 1988 AND OCTOBER, 1989 WHEN PETITIONER WAS SUPPOSED TO BE PLACED IN AN ALTERNATE JOB POSITION BECAUSE OF DOWNSIZING WAS ERRONEOUS AND PREJUDICIAL BECAUSE SUCH EVIDENCE SPECIFICALLY PROVED THAT PETITIONER'S TERMINATION IN OCTOBER, 1989 WAS THE RESULT OF AGE DISCRIMINATION?

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

KENNETH K. GEORGE,
Petitioner

vs.

BETHLEHEM STEEL CORP.
Respondent

Petition For a Writ of Certiorari to the United States Court of Appeals For The Third Circuit

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PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Kenneth K. George, prays that a Writ of Certiorari issue to review judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Order of the United States District Court for the Eastern District of Pennsylvania rendered August 27, 1992, and reconsideration denied on December 17, 1992 are unrecorded and appear at pages 4a and 19a of the Appendix herein.

The final Order of the Court of Appeals For the Third Circuit was dated July 19, 1994, and this Petition for Writ of Certiorari is timely filed within ninety (90) days thereof. The jurisdiction of this Honorable Court rests upon 28 U.S.C. §1254(1 and Rule 17 of this Honorable Court.

FEDERAL PROVISIONS INVOLVED

Fifth and Seventh Amendments to the United States Constitution and ADEA, 29 U.S.C. §§621-63.

STATEMENT OF THE CASE

On October 11, 1991, Petitioner filed this action against Respondent seeking damages arising from Respondent's alleged unlawful termination of Petitioner's employment based upon age.

In May of 1992, and prior to trial, the employer filed a motion in limine to preclude Petitioner from introducing evidence regarding the filling of any open position which Petitioner was otherwise qualified to fill outside the department of marine construction prior to July 15, 1989 (which was 300 days prior to date of filing Petitioner's EEOC Charge of Employment Discrimination).

On August 27, 1992, the District Court granted employer's motion in limine thus precluding Petitioner from introducing evidence at trial regarding the filling of

key open positions prior to July 15, 1989.

On December 17, 1992, the District court denied Petitioner's motion to reconsider the Order of August 27, 1992 which granted Respondent's motion in limine.

On the first day of trial, at jury selection, the trial judge did not appear at the Courthouse in Philadelphia and was about 60 miles away in his chambers in Reading. Only the trial court's deputy clerk was there.

In the course of voir dire, one potential juror, Marjorie J. Narde, No. 171, indicated that she had a personal problem with her employer, but that she could put her personal situation aside, and decide the case solely on the facts she hears from the witness stand and the law as instructed

by the judge.[1] The employer challenged this witness for cause.

A second potential juror, John D. Taglar, No. 242, indicated that he was a plaintiff in a handicap discrimination case, but that he could be fair to both because his case was separate and distinct from this case, and his case would in no way influence him. Again, the employer wanted to challenge this second potential juror also for cause.

At that point, the deputy clerk left the room, presumably to telephone the judge. The deputy clerk then came back and advised that parties that, without hearing or seeing the potential jurors, and despite the fact that both potential jurors indi-

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1.Petitioner's counsel made a record before the Court based upon the recollection of both counsel on the next day before the jury trial began. Pages 6 through 14 of Trial Transcript.

cated that they could put aside their own personal situations and be fair to both sides the trial court, in absentia, granted the challenges for cause, over objection.

The next day, the Petitioner complained on the record about this in absentia process which had the effect of giving the employer two extra peremptory challenges. The trial court ratified his in absentia, off-the-record rulings on the record.

Furthermore, the trial court improperly denied, in absentia, Petitioner's request for a transcript at time of voir dire questions to preserve the jurors answers for appellate review. Hence, the only record is the colloquy between the trial court and counsel discussing what transpired in absentia and off the record. As a result of these voir dire decisions, the trial court effectively provided employer

with two additional peremptory challenges which were not provided to Petitioner.

On August 24, 1993, the trial court granted employer's motion in limine (No. 2), and excluded the testimony of Arthur Huge who was scheduled to appear as a witness and testify about Petitioner's qualifications and his actual knowledge of employer's policy concerning the promotion of "high potential" younger employees to the detriment of older, experienced employees such as Petitioner. (App. Vol. 5-305a).

The Petitioner wanted to call Arthur Huge because, on October 16, 1989, the employer sent Petitioner a termination memorandum stating inter alia: "I have discussed the situation with G.M. Millenbruch and L.A. Arnett and both have advised me that there are no other positions available for you." L.A. Arnett is Lonnie

Arnett who was Petitioner's boss. G.M. Millenbruch was Arnett's boss. Arnett was employer's corporate controller who was supervising all of employer's accounting positions.

Arthur Huge is now a chief executive officer at a competing steel company with expertise in running a steel company. Mr. Huge had worked for Bethlehem Steel under the supervision of petitioner. Id. (App. Vol. 5-305a). Mr. Huge has first hand knowledge of Petitioner's superb abilities.

During Mr. Huge's career with Bethlehem Steel, Lonnie Arnett established a personnel committee where Arnett, Huge, and Petitioner interacted. (App. Vol. 5-305a). In the course of this committee work, Lonnie Arnett specifically identified employer's requirements for retaining and promoting Bethlehem Steel employees. Id. Lonnie Arnett explained employer's policy

that employer desired to retain and promote only what Bethlehem Steel dubbed HIPOTS--that is, high potential performers. Huge was to testify that Arnett specifically dictated employer's policy that no Bethlehem Steel employee should be promoted who could not also be promoted out of that position. Invariably, Bethlehem Steel's policy required promotion of a younger person. If more than one candidate existed, the candidate over forty and more definitely 50 yeas of age effectively was excluded from the promotion opportunity strictly applying Bethlehem Steel's HIPOTS policy. Mr. Huge was prepared to testify to this policy and its consequential, inevitable retention and promotion of younger employees.

Lonnie Arnett was a key person in the decision to terminate Petitioner as set forth in employer's termination letter.

As set forth above, Lonnie Arnett dictated the employer's retention and promotion policy which discriminated against older employees. Mr. Huge was a crucial witness to these facts. Nevertheless, the trial court erroneously decided as a matter of law that Lonnie Arnett was not involved in Bethlehem Steel's decision to terminate Petitioner, despite written documentation to the contrary! Finally, on August 27, 1993, the trial court granted employer's motion in limine (No. 3), and excluded the testimony of John Lushis, age 33, concerning his selection of Mr. Holum, age 42 under the theory that the filling of this open position for which Petitioner was most experienced and qualified was irrelevant to Petitioner's age discrimination claim. (App. Vol. 7-444a-445a).

After granting three separate motions in limine excluding evidence of discrimina-

tion, the jury reasonably entered a verdict in favor of Bethlehem Steel and against Petitioner. Petitioner timely appealed to the United States Court of Appeals for the Third Circuit challenging the district court orders excluding Petitioner's relevant and necessary evidence, and arguing that the in absentia jury selection process was unconstitutional. The United States Court of Appeals, Third Circuit affirmed. This Petition For Writ of Certiorari is now before this Honorable Court for disposition.

STATEMENT OF FACTS

Petitioner filed this age discrimination claim seeking damages (including reinstatement) arising from employer's termination of his employment based upon his age.

No dispute exists that Petitioner had a long, very successful career with Beth-

lehem Steel. Bethlehem Steel hired Petitioner in 1957 immediately after his graduation from Lehigh University. (App. Vol. 3-115a). Petitioner worked diligently and professionally earning numerous promotions. Id.

In May 1980, Bethlehem Steel promoted Petitioner to Operations Controller Shipbuilding Accounting in the home office. At that time, Petitioner was 50 years old, having been born on July 19, 1929.

Petitioner observed firsthand Bethlehem steel's trend to provide better employment opportunities to younger employees from 1984 until 1986. At that time, Petitioner was working on his employer's recession plans. (App. Vol. 2-87a-91a).

The Petitioner worked on the Personnel Committee. The Personnel Committee established a policy to provide opportunities

for people in accounting regardless of their departmental unit to obtain positions in other departments at Bethlehem Steel. (App. Vol. 2-143a). The Personnel Committee oversaw the screening of candidates for promotion and promotion decisions.

At trial, Petitioner did not complain only about Respondent's termination based upon age. Petitioner also claimed that Bethlehem Steel intentionally failed to provide him with alternative employment which Bethlehem Steel provided younger employees.

After Bethlehem Steel announced the restructuring, it continued its defacto policy of promoting and hiring younger employees to the exclusion of older workers.

If the motion in limine was not granted, Petitioner could have proven that Bethlehem Steel appointed Jay Frantz as

Controller of Beth Energy Mines in July 1988. (App. Vol. 2-121a). Mr. Frantz was about 20 years younger than Petitioner. (App. Vol. 2-126a). This position required fewer skills and experience than Petitioner possessed. (App. Vol. 2-122a-125a).

Bethlehem Steel hired Anthony Ponte as Manager of Financial Planning and Control in August 1988. (App. Vol. 2-131a). Mr. Ponte is substantially younger than Petitioner. (App. Vol. 2-147a). On November 1, 1986, Bethlehem Steel had promoted Mr. Ponte to another position for which Petitioner had greater experience and qualifications. (App. Vol. 2-146a,147a).

Bethlehem Steel appointed Bob Jackson to the position of Director, Treasury Services effective August 1, 1988. (App. Vol. 2-127a-128a). Again Petitioner learned of the open position only after Respondent filled it. Id. Petitioner was

more experienced than Mr. Jackson. (App. Vol. 2-129a). Mr. Jackson is about forty years old. (App. Vol. 2-130a).

Bethlehem Steel hired Mark Davis from outside of its corporation for the position of Assistant Controller in the Accounting Department. (App. Vol. 2-130a). Besides being unfamiliar with the corporation (for which Petitioner had worked for 32 years), Mr. Davis was only about 33 years old. (App. Vol. 2-131a).

Petitioner had no knowledge of these positions under after Bethlehem Steel filled them. (App. Vol. 2-126a). Petitioner had explicitly asked all persons in decision-making positions to inform him of job openings so he could be considered. Id. Bethlehem Steel never even allowed Petitioner to be considered. Id. After each announcement, Petitioner personally spoke to Mr. Arnett who was involved in

these decisions to by-pass Petitioner in favor of younger employees (App. Vol. 2-132a). The jury, however, never heard this evidence because of the order excluding it.

Petitioner continued performing his Operations Control functions and responsibilities from the date of the downsizing (January of 1988) until his termination in October 1989.

During that period of time, numerous HIPOTS were promoted to positions which Petitioner was well qualified by work experience, education and training. Instead, Bethlehem Steel by-passed Petitioner and the jury was not permitted by the Court to hear this evidence.

Bethlehem Steel terminated Petitioner effective October 31, 1989, after announcing the shutting down of Marine Construction in January of 1988. As set forth above, the trial court excluded

evidence of age discrimination during this period of time. The United States Court of Appeals affirmed such exclusions. A Petition For Writ Of Certiorari is now before this Honorable Court for disposition.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

The Federal Court of Appeals has condoned the practice of permitting non-attendance in the Eastern District of Pennsylvania by Federal judges during voir dire, even for purposes of ruling on challenges for cause, which appears inconsistent with constitutional standards required by the Supreme Court of the United States.

ARGUMENT

I. WHETHER OR NOT THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENIED PLAINTIFF DUE PROCESS OF LAW AND HIS RIGHT TO A FAIR TRIAL BY CONDONING THE PRACTICE IN THE EASTERN DISTRICT OF THE TRIAL COURT NOT ATTENDING VOIR DIRE, NOT EVEN BEING IN THE COURTHOUSE WHILE VOIR DIRE IS BEING CONDUCTED, NOT MAKING A RECORD OF THE VOIR DIRE QUESTIONS, AND PERMITTING THE TRIAL COURT IN ABSENTIA TO GRANT CHALLENGES FOR CAUSE BASED UPON DISCUSSIONS BETWEEN THE DEPUTY CLERK AND THE TRIAL COURT?

This Honorable Court has in the recent past highlighted the constitutional importance of the jury selection process in order to assure civil and criminal litigants Due Process of Law and their constitutional right to a fair trial. See, Batson v. Kentucky, 476 U.S. 79 (1986); striking venirepersons because of race is impermissible; Edmonson v. Leesville Concrete, 500 U.S. 614 (1991); Hernandez v. New York, 500 U.S. 352 (1991); JEB v. Alabama, ___ U.S. ___ (1994): "We have recognized that whether the trial is civil

or criminal, potential jurors, as well as litigants, have an equal right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice..."

The sina qua non of a fair jury selection process is that the trial judge must, at least, show up in the room where there is a dispute on a challenge for cause, see and hear the veniremen for himself-herself, and then rule on the objection after giving the parties an opportunity to be heard on the objection.

In this case, two prospective jurors indicated that they could be fair to both sides, and would determine the case solely on the evidence in front of them, and on the law as instructed by the trial judge. The defense objected to juror nos. 1671 and 242. Without seeing or hearing the jurors,

without being in the courtroom, and without even a telephone conference call with counsel, the trial judge struck both jurors in absentia. That would appear to be a flagrant violation of Due Process and fair jury selection process enunciated in JEB v. Alabama, supra. Hence, the writ of certiorari ought to be granted to cure this flagrant abuse.

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II. WHETHER OR NOT THE EXCLUSION OF EVIDENCE CONCERNING PROMOTION POLICIES BETWEEN JANUARY, 1988 AND OCTOBER, 1989 WHEN PETITIONER WAS SUPPOSED TO BE PLACED IN AN ALTERNATE JOB POSITION BECAUSE OF DOWNSIZING WAS ERRONEOUS AND PREJUDICIAL BECAUSE SUCH EVIDENCE SPECIFICALLY PROVED THAT PETITIONER'S TERMINATION IN OCTOBER, 1989 WAS THE RESULT OF AGE DISCRIMINATION?

1. The trial court improperly excluded Petitioner's evidence, which evidence is relevant, probative, and necessary for Petitioner to prove his prima facie case and Respondent's pattern and practice of age discrimination. On August 27, 1993,

the District Court entered an Order precluding Appellant from introducing evidence at trial regarding the filling of any open position outside of Petitioner's department prior to July 15, 1989, even though Petitioner was supposed to be placed in alternate employment during the period of January 1988 through October 1989.

From the beginning, Petitioner has contended that Bethlehem Steel intentionally failed to provide him with alternative employment which the employer provided younger employees. After Bethlehem Steel announced the restructuring of shipbuilding in January 1988, Bethlehem Steel continued its de facto policy of promoting and hiring younger employees to the exclusion of older workers.

After Bethlehem Steel announced the closing of the marine construction department, the following positions were actually

filled by Bethlehem Steel, and these were positions for which Petitioner was ideally suited and for which he should have received consideration:

A) Manager, Financial Planning and Control, 9/1/88, Anthony R. Ponte, age 31;

B) Controller, Beth. Energy Mines, 5/1/88, Jay F. Frantz, age 44

C) Director, Treasury Services, 5/1/88, Robert Jackson, age 41;

D) Assistant Controller, Accounting, 3/7/88, Mark A. Davis, age 37; and

E) Manager, Restructured Operations, 4/6/89, John F. Lushis, age 33.

Thus, Petitioner proffered evidence of five positions which he could have filled after the actual announcement in January of 1988, but Petitioner was not considered for these positions because of the discriminatory practice of filling these positions

with substantially younger employees.

2. The cutoff point selected by Respondent and adopted by the District Court is arbitrary and capricious. the fact remains that five positions were filled with younger employees and Petitioner was qualified by education and experience to fill any of these positions, particularly the position of John F. Lushis, manager, Restructured Operations, which was the last position filled immediately prior to Petitioner's termination.

The Marine Construction Division (MCD) downsizing was announced in January of 1988. On October 31, 1989, Petitioner was terminated. In that period of time, five positions were filled which should have gone to Petitioner, the qualified and experienced employee. This evidence is highly relevant especially to show a prima

facie case and pretext. Bethlehem Steel had actual knowledge that Petitioner was interested in and qualified for these positions. The employer ought not to have been allowed arbitrarily to select one position which Bethlehem Steel claims Petitioner should have received and then limit Petitioner's evidence to that one position.

3. At trial, the District Court adhered to and extended its erroneous August 27, 1993 order precluding Petitioner's relevant probative evidence.

a. First, on August 24, 1993, the trial court granted Respondent's motion in limine (No. 2) and excluded the testimony of Arthur Huge who was scheduled to appear as a witness and testify about Petitioner's qualifications and his actual knowledge of Respondent's policy concerning the promotion of "high potential" younger

employees to the detriment of older, experienced employees such as Petitioner. (App. Vol. 5-305a).

On October 16, 1989, Bethlehem Steel sent Petitioner a termination memorandum stating inter alia: "I have discussed the situation with G. M. Millenbruch and L. A. Arnett and both have advised me that there are no other positions available for you." L. A. Arnett is Lonnie Arnett who was Petitioner's boss. G. M. Millenbruch was Arnett's boss. Arnett is the employer's corporate controller who was supervising all accounting positions.

Arthur Huge is now a chief executive officer for a competing steel company with expertise in running a steel company. Huge had worked for Bethlehem Steel under the supervision of Petitioner. Mr. Huge has first hand knowledge of Petitioner's superb abilities.

During Mr. Huge's career with Bethlehem Steel, Lonnie Arnett established a personnel committee where Arnett, Huge and Petitioner interacted. In the course of this committee work, Lonnie Arnett specifically identified Bethlehem Steel's requirements for retaining and promoting employees. Id. Lonnie Arnett explained the policy that Bethlehem Steel desired to retain and promote only what the employer dubbed HIPOTS--that is, high potential performers. Id. Huge was to testify that Arnett specifically dictated corporate policy that no one should be promoted who could not be promoted out of that position Invariably, Bethlehem Steel's policy required promotion of a younger person. If more than one candidate existed, the candidate over forty and more definitely 50 years of age effectively was excluded from the promotion opportunity. Mr. Huge was

prepared to testify to this policy and its consequential, inevitable retention and promotion of younger employees.

Lonnie Arnett was a key person in the decision to terminate Petitioner as set forth in the employer's termination letter. As set forth above, Lonnie Arnett dictated Bethlehem Steel's retention and promotion policy which discriminated against older employees. Mr. Huge was scheduled to testify to these facts. Nevertheless, the trial court erroneously decided as a matter of law that Lonnie Arnett was not involved in Bethlehem Steel's decision to terminate Petitioner, despite written documentation to the contrary.

The trial court's conclusion is contrary to Bethlehem Steel's own evidence. Specifically, Petitioner's supervisor, David Klinges testified that Petitioner's primary area of focus to search for con-

tinued employment with the employer should have been with Lonnie Arnett. (App. Vol. 3-173a-174a). Despite Lonnie Arnett's direct involvement in Petitioner's opportunities for retention with Bethlehem Steel, the trial court prejudicially extended its exclusion of relevant evidence of age discrimination. Hence, the orders excluding Arthur Huge's evidence ought to be reversed, and Petitioner ought to be allowed an opportunity to present evidence at a new trial.

b. Second, on August 27, 1993, the trial court again granted the employer's motion in limine (No. 3), and excluded the testimony of John Lushis, age 33, concerning his selection of Mr. Holum, age 42, under the theory that the filling of this open position for which Petitioner was most experienced and qualified was irrelevant to Petitioner's age discrimina-

tion claim. (App. Vol. 7-444a-445a).

As already indicated, the trial court had granted the employer's motion in limine (Nos. 1 and 2), excluding evidence of potential positions for Petitioner outside of his original department. These orders disregarded the fact that Petitioner's original department no longer existed. Next, the trial court excluded testimony regarding a potential position for Petitioner filled after an arbitrary date adhered to by the trial court. Specifically, the trial court accepted Respondent's unsupportable contention that no evidence of discrimination is admissible if the discriminatory act occurred prior to 300 days before Petitioner's filing of an EEOC charge. The employer's legal argument, adopted by the trial court, is wholly unsupportable.

It is axiomatic that an age discrimi-

nation employee may present evidence of discrimination which predates the event triggering the deadline for filing an EEOC charge. Age Discrimination may be proved by pattern and practice. Hence, this Honorable Court ought to reverse the lower court orders excluding the proffered evidence and grant Petitioner a new trial in which Petitioner has an opportunity to present evidence.

c. Third, the trial court improperly excluded testimony by Petitioner concerning the job requirements of the senior analyst position where this was the only position about which the court previously had indicated that it would allow testimony.

Even under all of the court's previous limits upon Petitioner's evidence, the trial court improperly excluded evidence concerning filling the senior analyst

position. No dispute exists that the employer filled the job of senior analyst on September 1, 1989. (App. Vol. 7-333a). Senior analyst is a job for which Petitioner was fully qualified. Petitioner's evidence, however, was that Mr. Lushis, who would supervise the position, advised Petitioner that Petitioner would not be happy working for Mr. Lushis who was so much younger than Petitioner. Even adhering to the arbitrary time deadline (i.e., July 15, 1989), evidence concerning the employer's refusal to place Petitioner in this position which was filled September 1, 1989 ought to have been admitted.

d. The trial court denied Petitioner a fair trial through combined impact of three trial Court Orders: 1) excluding Petitioner from introducing evidence of five relevant open positions which the employer knew Petitioner was qualified for

and interested in, and the employer filled after the announcement of elimination of Petitioner's department; 2) excluding Bethlehem Steel's pattern and policy of passing over older employees for younger employees and admitted by Mr. Arnett to Mr. Arthur Huge; and 3) excluding evidence concerning employee's refusal to place Petitioner in the position of senior analyst which position the employer admitted was filled during the arbitrary and capricious timeframe constructed by the trial court.

As Bethlehem Steel's attorney repeatedly pointed out to the trial court, Petitioner's department no longer existed after January 1, 1988. (App. Vol. 7-438a-439a). Petitioner's continued employment with Bethlehem Steel necessarily must have, and did, actually come from other departments. The trial court thus erred as a matter of

law in limiting evidence to Petitioner's department within an arbitrary time frame. Hence, the Court's exclusion of Petitioner's evidence was tantamount to a directed verdict in favor of Bethlehem Steel. (App. Vol. 7-438a-439a).

3. Petitioner sought to use the evidence to bolster his case that Bethlehem Steel's proffered reason for termination was pretextual. Petitioner's evidence was relevant in that it "makes the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401.

4. Evidence of Bethlehem Steel's pattern and practice of age discrimination is relevant. McDonnell Douglas v. Green, 411 U.S. at 804-805, 93 S.Ct. at 1825 (defendant's policy and practice with respect to employment of protected class

relevant to showing of pretext). Such evidence is admissible even when the action is a private action brought by a single employee claiming age discrimination. Id. See, e.g., Caslin v. General Electric Co., 619 F.2d 45 (6th Cir, 1982); Kenny v. Show Industries, Inc., 764 F.Supp. 1501 (N.D., Georgia, 1991).

5. At trial, the lower could should have properly instructed the jury that Petitioner can establish age discrimination "by showing [employer] engaged in a pattern and practice of discrimination against their employees or prospective employees." Bruno v. W.B.Saunders Company and CBS, 882 F.2d 760 (3d Cir, 1989) at 767 f.n. 3.

6. This Petitioner was entitled to rely on the discriminatory pattern and practice as direct evidence of age discrimination against him. Abrams v. Lightolier, Inc., 709 F.Supp. 509 (DC, NJ 1089).

7. The district court erred as a matter of law in precluding Petitioner from introducing at trial highly relevant, probative evidence.

In sum, Petitioner sought admission of evidence regarding Bethlehem Steel filling five positions in other departments--because Petitioner's department was closed down--after January 1988 with younger persons less qualified and less experienced than Petitioner. Petitioner had evidence that he discussed these positions with Lonnie Arnett. Despite actual notice to the employer that the Petitioner wanted these jobs, the trial court ruled that the awarding of these promotions to under age 40 employees was not relevant to prove discrimination. That conclusion is erroneous.

B. Petitioner's proffered evidence is relevant to establish a prima

facie case and pretext claim. Petitioner as a qualified experienced accountant, possessed job skills transferable to any of the employer's departments.

Petitioner's evidence of the employer filling these positions in other departments after the January 1988 decision to close down marine construction department was not only relevant, but highly probative considering that: 1) the employer filled several open positions with younger persons, less qualified and less experienced that Petitioner; and 2) after January 1988, according to employer, Petitioner was required to find employment in another or face termination.

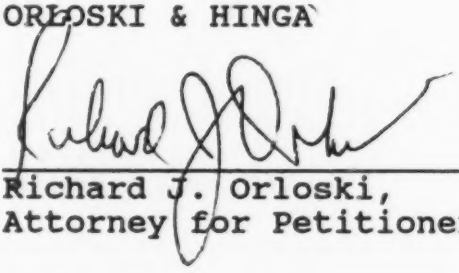
The District Court's order granting the employer's motion in limine precluded Petitioner from demonstrating how Bethlehem Steel carried out its plan to terminate Petitioner based upon age despite the

viable possibility of transferring Petitioner to numerous open positions for which Bethlehem Steel knew Petitioner was qualified.

CONCLUSION

For the foregoing reasons, Petitioner's Petition For Writ of Certiorari ought to be granted.

ORLOSKI & HINGA



Richard J. Orloski,
Attorney for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 93-1887 and 93-1912

KENNETH K. GEORGE,
Appellant in No. 93-1887

v.

BETHLEHEM STEEL CORP.

KENNETH K. GEORGE

v.

BETHLEHEM STEEL CORP.
Appellant in No. 93-1912

Appeal from the United States District Court for the Eastern District of Pennsylvania
(D.C. Civ. No. 91-cv-06434)
District Judge:
Honorable Daniel H. Huyett, 3d

Argued
June 8, 1994
Before, MANSMANN and ALITO,
Circuit Judges
and
SIMANDLE, District Judge*

JUDGMENT ORDER

After consideration of all contentions

raised by the appellants, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against the appellant in each appeal.

BY THE COURT

CAROL LOS MANSMANN
Circuit Judge

*Honorable Jerome B. Simandle of the United States District Court for the District of New Jersey, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KENNETH K. GEORGE	:	CIVIL ACTION
	:	
v.	:	
	:	
BETHLEHEM STEEL CORPORATION	:	NO. 91-6434
	:	

CIVIL JUDGMENT

Before THE HONORABLE DANIEL H. HUYETT, 3RD

AND NOW, this 30th day of August, 1993, in accordance with JURY VERDICT RENDERED AUGUST 30, 1993,

IT IS ORDERED that Judgment be and the same is hereby entered in favor of defendant and against plaintiff.

BY THE COURT:

ATTEST: Leslie F. Stott

Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KENNETH K. GEORGE Plaintiff	:	CIVIL ACTION
v.	:	NO. 91-6434
BETHLEHEM STEEL CORPORATION, Defendant	:	

O R D E R

HUYETT, J. August 27, 1992

Upon consideration of defendant Bethlehem Steel Corporation's motion in limine to preclude plaintiff from introducing evidence regarding the filling of any position outside plaintiff's department prior to July 15, 1989, plaintiff Kenneth K. George's response, defendant's reply, plaintiff's sur-reply and because:

1. Plaintiff Kenneth K. George asserts in this action that defendant Bethlehem Steel Corp. violated the Age Discrimination in Employment Act, 29 U.S.C. §§621 et seq ("ADEA") by terminating him

from employment on October 31, 1989.

2. Plaintiff began his employment with Bethlehem Steel in 1957. Plaintiff worked in various accounting positions from 1957 until his promotion to Operations Controller of Shipbuilding Accounting on May 1, 1980. In October of 1980, a Bethlehem Steel strategic planning study concluded that Bethlehem's ship repair yards were no longer sufficiently profitable and that attempts should be made by Bethlehem to sell its ship repair yards. A decade long decline in the operations of Bethlehem's shipbuilding Department culminated in the January, 1988 announcement by Defendant that it would divest itself of three of its four remaining ship yards and consolidate all remaining Bethlehem marine construction at the Sparrows Point yard.

3. Defendant contends that from January of 1988 until October 31, 1989,

plaintiff was told that there were no permanent positions available for plaintiff and that he was being kept on Bethlehem's payroll solely through temporary assignments. Plaintiff asserts in opposition that he was never told that his employment position was going to be eliminated. Further, plaintiff contends that he reasonably believed that his job function with defendant would continue. Finally, plaintiff alleges that defendant led him to believe that he would be transferred to a comparable position with defendant, rather than being terminated.

4. On May 11, 1990, plaintiff George filed a charge of age discrimination with the Equal Employment Opportunity Commission ("EEOC") complaining that he was terminated from his position as Controller of Bethlehem Steel's Marine Construction Division ("MCD") because of his age.

Defendant Bethlehem contends that George's position was eliminated as part of a reduction in force ("RIF") in the MCD which resulted from the long-term downturn in Bethlehem Steel's shipbuilding business.

5. On October 11, 1991, plaintiff filed the instant complaint. Defendant admits that plaintiff's assertions in his complaint are consistent with the allegations of plaintiff's EEOC charge. However, defendant claims that in plaintiff's proposed final pretrial order submitted to the Court (Reading Station) on May 6, 1992, plaintiff raises claims which are new and distinct from the claims raised in the EEOC charge and plaintiff's complaint. Specifically, defendant states that:

> George included new separate and distinct claims asserting that there were numerous positions--in other divisions unrelated to MCD--filled by younger persons, for which George was qualified (some of which were filled

> many months before and others years before his last day of work) and that Bethlehem Steel's failure to place him in any of those positions constituted age discrimination.

Defendant's Memorandum of Law at 2-3.

Plaintiff contends that he should have received consideration for the following positions after the announcement of cutbacks in the MCD in January of 1988:

Manager, financial Plan. & Control, 9/1/88, Anthony R. Ponte, age 31

Controller, Beth. Energy Mines, 8/1/88, Jay F.Frantz, age 44

Director,Treasury Services, 8/1/88, Robert L. Jackson, age 41

Assistant Controller, Corp. Accntg, 3, /88, Mark A. Davis, age 37

Manager, Restructured Operations, 4/6/89, John F. Lushis, age 33.

Plaintiff's Sur-Reply at 2.

Further, plaintiff asserts that he should have been considered for the following positions prior to the January,

1988 announcement that the MCD would close:

Director, Business Dev., Mar. Const. 11/1/86, John F. Lushis, age 33[1]

Controller Steel Related Group, 11/1/86, David J. Hinrichs, age 36

Manager, Capital Budg. & Property, 11/17/86, Anthony R. Ponte, age 29

Controller, Bethlehem Plant, 1/14/87, T.W. Harlan, age 38

Manager, Acctng, Affiliated Ore & Water Transportation, 1/1/88, Edward J. Hudak, age 41

Manager, Financial Acctng & Report, 1/1/88, Anthony R. Ponte, age 30[2]

Defendant objects to plaintiff's claims regarding the filling of positions in other divisions and accordingly moves to preclude

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1.The Court notes that plaintiff asserts that John F. Lushis was thirty-three (33) years of age on both April 6, 1989 and May 1, 1986. Presumably, on one or both of these dates, Mr. Lushis was not thirty-three (33) years of age.

2. The Court notes that plaintiff lists other names of individuals awarded positions, but fails to list the age of these individuals at the time they were awarded the position.

plaintiff from introducing evidence about the filling of any open position outside the department in which plaintiff worked prior to July 15, 1989.[1]

6. Defendant contends that plaintiff should be precluded from introducing this evidence because (1) permitting plaintiff to complain about the filling of positions outside plaintiff's department prior to July 15, 1989 would bypass the ADEA's administrative procedures; (2) evidence regarding other positions is irrelevant to the issues before the Court; and (3) introduction of evidence regarding the filling of positions outside plaintiff's department prior to July 15, 1989 would be unduly prejudicial. See Defendant's Memorandum of

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1. The July 15, 1989 date proposed by defendant is the earliest date within the statutory period covered by plaintiff's charge filed with the Equal Employment Opportunity Commission ("EEOC") on May 11, 1990.

Law at 3-5.

7. Plaintiff opposes defendant's motion in limine and argues that (1) the evidence regarding the filling of other positions prior to July 15, 1989 is relevant in that it bolsters plaintiff's claim of pretext; (2) evidence regarding the filling of other positions prior to July 15, 1989 is relevant evidence of defendant's pattern and practice of age discrimination which supports plaintiff's pretext claim; and (3) the evidence is relevant to show a pattern of practice of age discrimination as direct evidence of age discrimination against plaintiff. Plaintiff's response at 6-7.

8. Defendant asserts that evidence regarding the filling of positions outside plaintiff's department prior to July 15, 1989 is irrelevant to plaintiff's effort to prove pretext. As Williams v.Williams

Electronics, Inc., 856 F.2d 920 (7th Cir, 1988) persuasively states:

> [b]oth the alleged discriminatory work assignments and discriminatory comments were attributable to individuals who were not involved in the layoff decision. Although [defendant employer] might be responsible for the actions of these individuals in a case in which the actions themselves were claimed to be discriminatory, the actions fall short of forming a basis for demonstrating that the non-discriminatory explanations for decisions made by other individuals were pretexts.

Id. at 925; see also Fortino v. Quasar Co., 950 F.2d 389, 395 (7th Cir, 1991) (holding "action and comments by employees not involved in a discharge decision cannot provide a basis for charging other employees with discrimination").

Defendant Bethlehem Steel contends that evidence regarding the filling of open positions outside of plaintiff's department prior to July 14, 1989 is irrelevant to plaintiff's case under the reasoning of

Williams.[1]

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1. The Court notes that throughout defendant's briefing in support of the instant motion in limine, defendant asserts two different prayers for relief. First, defendant seeks "an Order precluding plaintiff Kenneth K. George from introducing evidence concerning the filling of any open position outside the department in which George worked prior to July 15, 1989." Defendant's Reply Memorandum at 1. The Court concludes that defendant's first prayer for relief should be granted because the filling of such open positions, which were outside the department in which plaintiff worked, prior to July 15, 1989 is simply irrelevant to the instant case. Defendant, however, appears to also contend that the Court should preclude plaintiff from introducing evidence concerning the filling of any position prior to July 15, 1989 because introduction of this evidence would permit plaintiff to circumvent the mandatory administrative prerequisites for filing suit under the ADEA. Here, however, evidence of the filling of open positions within the MCD prior to July 15, 1989 may be relevant to plaintiff's claim of pretext. Nothing in the cases relied upon defendant, see e.g. United Air Lines v. Evans, 431 U.S. 553 (1977); Conaway v.Control Data Corporation, 955 F.2d 358(5th Cir. 1992); Janikowski v. Bendix Corp., 823 F.2d 945 (6th Cir. 1987); Mull v. ARCO Durethene Plastics, Inc., 784 F.2d 284 (7th Cir, 1986), concerns the introduction of evidence. Rather, defendant's cases regard those actions upon which a plaintiff can bring suit under the ADEA. Accordingly, the Court will reject defendant's second prayer for relief.

In essence, defendant argues that the hiring decisions within other departments of Bethlehem Steel are irrelevant to plaintiff's claim of pretext because plaintiff neither applied for these positions nor was considered for these positions. Further, defendant contends that permitting this evidence to be introduced at trial would be to attribute decisions wholly independent of plaintiff's employment status to the circumstances of plaintiff's discharge. The Court concludes under the persuasive reasoning of Williams and Fortino that evidence regarding the filling of open positions outside of plaintiff's department prior to July 15, 1989 must be excluded under Federal Rules of Evidence 401 and

402. [1] Simply put, introduction at trial of proof that positions in other departments were filled by persons younger than plaintiff simply would not make it more probable or less probable that defendant's proffered business justification was pretextual. See, Fed. R. Evid. 401.[2]

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1. The Court notes that defendant correctly argues that Bethlehem Steel possessed no obligation to transfer George to another position or "bump" an employee with less years of service in order to guarantee plaintiff an employment position. See e.g., Ridenour v. Lawson Company, 791 F.2d 52, 57 (6th Cir. 1986); Sahadi v. Reynolds Chemical 636 F.2d 1116 (6th Cir. 1980; E.E.O.C. v. United States Steel, 649 F.Supp. 964, 966 n.1 (W.D. Pa. 1986).

2. The Court must reject plaintiff's arguments that evidence regarding the filling of positions outside plaintiff's department prior to July 15, 1989 is (1) relevant evidence of defendant's pattern and practice of age discrimination which supports plaintiff's pretext claim; and (2) relevant evidence which shows a pattern of practice of age discrimination as direct evidence of age discrimination against

9. Even if the Court concluded that evidence regarding the filling of pen positions outside of plaintiff's department prior to July 15, 1989 was relevant, the Court would exclude the evidence under Rule 403. Simply put, any probative value this evidence arguably possesses is far outweighed by the risk of undue confusion and unfair prejudice posed by its admission at

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...Continued...

plaintiff. Plaintiff's Response at 7, citing Caslin v. General Electric Co., 696 F.2d 45 (6th Cir. 1982); Kenny v. Show Industries, Inc., 764 F.Supp. 1501 (N.D. Ga. 1991); Bruno v. W.B. Saunders Company, 882 F.2d 760 (3d Cir. 1989), cert denied, 493 U.S. 1062 (1990); Abrams v. Lightolier, Inc., 702 F.Supp. 509 (D.N.J. 1089). The cases relied upon by plaintiff were all supported by statistical evidence and thus are distinguishable. Here, plaintiff has wholly failed to provide the statistical evidence necessary to support a claim of disparate impact or to support the introduction of disparate impact evidence in support of a disparate treatment claim. See Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989); Haskell v. Kaman Corp., 743 F.2d 113, 121 (2dCir, 1984).

trial. If the Court permitted the admission of evidence regarding the filling of open positions outside of plaintiff's department prior to July 15, 1989, the result would be a prolonged trial which included a series of "mini-trials" on the employment decisions made in regard to each open position. The Court concludes that, even if this evidence were relevant to the case at hand,the evidence would be properly excluded at trial as unfairly prejudicial to defendant and unduly confusing to the jury. See.g. Moorhouse v. Boeing Company, 501 F.Supp. 390, 392-93 (E.D. Pa.) aff'd 639 F.2d 774 (3d Cir. 1980); McCluney v. Jos. Schlitz Brewing Co., 728 F.2d 924, 929 (7th Cir. 1984); Gonzalez v. Public Health Trust, 686 F.Supp. 898, 899 (S.D., Fla. 1988); Wingfield v. United Technologies Corp., 678 F.Supp. 973 (D. Conn. 1988).

Accordingly, defendant Bethlehem

Steel's motion in limine to preclude plaintiff from introducing evidence regarding the filling of any open position outside of plaintiff's department prior to July 15, 1989 is GRANTED. Plaintiff Kenneth K. George shall be precluded from introducing evidence at trial regarding the filling of any open position outside of Plaintiff's department prior to July 15, 1989.

IT IS SO ORDERED.

Daniel H. Huyett, 3rd, Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KENNETH K. GEORGE Plaintiff	:	CIVIL ACTION
vs.	:	NO. 91-6434
BETHLEHEM STEEL CORPORATION, Defendant	:	

O R D E R

HUYETT, J. December 17, 1992

Upon consideration of plaintiff Kenneth George's motion to reconsider this Court's order of August 27, 1992, defendant Bethlehem Steel's response and because:

1. In May of 1992, defendant filed a motion in limine to preclude plaintiff from introducing at trial evidence regarding the filling of open positions outside of plaintiff's department prior to July 15, 1989. The Court granted this motion by Order of August 27, 1992. Plaintiff now seeks reconsideration of that Order and a ruling that plaintiff mayintroduce evidence

regarding defendant's filling of open positions inside and outside of plaintiff's department after the January 1988 announcement that it would eliminate plaintiff's department.

2. As the Order of August 27, 1992, is not a final judgment, reconsideration is not governed by the strict dictates of Fed. R. Civ. P. 59(e) or 60. Instead, reconsideration of interlocutory orders, such as the one at issue here, is "'left within the plenary power of the court that rendered them toafford such relief from them as justice requires.'" Johnson v. Township of Bensalem, 609 F.Supp. 1340, 1342 (E.D., Pa. 1985) (citations omitted). However, parties are not free to relitigate issues that the court has already resolved, and reconsideration should be sparingly granted. Id. at 1342.

3. After careful consideration of the substantial record on this issue, I will deny plaintiff's motion for reconsideration. Plaintiff's arguments in support of his motion merely restate his prior assertions, and he fails to present any new or persuasive reasoning that would merit reconsideration.

Accordingly, plaintiff's motion for reconsideration of the Court's Order ofaugust 27, 1992, is DENIED.

IT IS SO ORDERED.

Daniel H. Huyett, 3d, Judge.

Supreme Court, U.S.
FILED
NOV 14 1994
OFFICE OF THE CLERK

No. 94-649

In The

Supreme Court of the United States

October Term, 1994

KENNETH K. GEORGE,

Petitioner,

v.

BETHLEHEM STEEL CORPORATION,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF RESPONDENT BETHLEHEM STEEL CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether the granting of a challenge for cause during civil jury selection causes cognizable prejudice to the party opposing the challenge, where the jury ultimately impanelled is fair and impartial.

2. Whether the district court abused its discretion in excluding evidence of employment decisions made by persons not involved in the decision to terminate the plaintiff's employment.

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STATEMENT OF CORPORATE AFFILIATIONS

Pursuant to Supreme Court Rule 29.1, respondent represents (i) that Bethlehem Steel Corporation is not a subsidiary of any corporation, and (ii) that Bethlehem Steel Corporation owns interests in various subsidiaries as set forth in Appendix 1 hereto.

JURISDICTION

The United States District Court for the Eastern District of Pennsylvania had subject matter jurisdiction over this action under 28 U.S.C. § 1331. Jurisdiction of the Court of Appeals was based upon 28 U.S.C. § 1291. This Court's jurisdiction is conferred by 28 U.S.C. § 1254(1).

COUNTERSTATEMENT OF THE CASE

A. Procedural History

The complaint in this action was filed by petitioner Kenneth K. George ("George") on October 15, 1991, in the United States District Court for the Eastern District of Pennsylvania. George asserted a claim against respondent Bethlehem Steel Corporation ("Bethlehem Steel") under Section 4 of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623, as amended ("ADEA"). The district court conducted a bifurcated trial in which the issue of the timeliness of George's claim was tried first, followed by a trial on the merits. The jury found during the first phase that George's complaint was timely, but found in the second phase that Bethlehem Steel did not

discriminate against George on the basis of his age. The district court awarded judgment in favor of Bethlehem Steel on the merits in accordance with the jury's verdict.

By judgment order dated July 19, 1994, the Court of Appeals for the Third Circuit affirmed the district court's judgment in favor of Bethlehem Steel. George's Petition for Certiorari (hereafter, "George Pet.") followed.

B. Counterstatement of Facts.

Petitioner Kenneth George was employed by Bethlehem Steel in various accounting positions from 1957 until his termination in 1989. On January 27, 1988, Bethlehem Steel notified George and others working in the Home Office of Bethlehem Steel's Marine Construction Division that their positions were to be eliminated. That decision was made by Robert Funk, President of the company's Steel-Related Group. (Court of Appeals Joint Appendix (hereafter, "Ct. App. Jt. App."), Vol. 5, 336-38; Vol. 6, 357-58). George was offered the position of Controller, Freight Car Division, which he declined on February 1, 1988. (Ct. App. Jt. App., Vol. 7, 482). During the next twenty-one months, George worked on various temporary assignments within Bethlehem Steel, while he searched unsuccessfully for another permanent position within the company. George's employment terminated in October, 1989, at the conclusion of his final temporary assignment.

Bethlehem Steel disagrees with various statements of fact made by George in his Petition for Certiorari. George

suggests that "Bethlehem Steel intentionally failed to provide [George] with alternative employment which Bethlehem Steel provided younger employees." (George Pet. at 13). In fact, all five professional employees affected by the elimination of the Home Office of the Marine Construction Division were in their fifties at the time of the restructuring, and only one of those persons, an engineer, accepted permanent alternative employment within the company.

George asserts that "Bethlehem Steel [followed a] *defacto* policy of promoting and hiring younger employees to the exclusion of older workers." (George Pet. at 13). No such policy existed, and the jury concluded that Bethlehem Steel had not discriminated against George on the basis of his age.

George avers that he "explicitly asked all persons in decision-making positions to inform him of job openings so he could be considered." (George Pet. at 15). The deposition testimony on which George relies for that statement (Ct. App. Jt. App., Vol. 2, 126) was not a part of the trial record, and, in all events, does not support the statement for which it is cited. Moreover, George's assertion is implausible, given the hundreds of persons entrusted with employment decisions within Bethlehem Steel Corporation.

George describes a "Personnel Committee" (George Pet. at 8-9, 12-13) that allegedly adopted a promotion policy which discriminated against older workers. The committee that George describes, however, merely made recommendations, not decisions, on intra-company

assignments of accountants. Moreover, the committee disbanded in 1986, some two years before the decision was made to eliminate the Home Office of the Marine Construction Division.

George repeatedly, and unsuccessfully, sought to show at trial that Lonnie Arnett participated in the decision to terminate George's employment. He avers in this Court (i) that "Lonnie Arnett . . . was employer's corporate controller who was supervising all of employer's accounting positions" (George Pet. at 7-8); (ii) that "Arnett was a key person in the decision to terminate [George] as set forth in employer's termination letter" (George Pet. at 9); and (iii) that "Arnett dictated the employer's retention and promotion policy which discriminated against older employees" (George Pet. at 10). In fact, Mr. Arnett did not supervise all, or even most, of Bethlehem Steel's accounting positions; Arnett had no role in the decision to terminate George other than to advise Mr. Funk, when asked, that there were no open positions in Mr. Arnett's unit (Trial Exhibit P-24); and Mr. Arnett did not dictate Bethlehem Steel's retention and promotion policies.

George argues that "the trial court erroneously decided as a matter of law that Lonnie Arnett was not involved in Bethlehem Steel's decision to terminate [George] . . . . " (George Pet. at 10). That decision by the district court, however, was carefully explained by the district court (Ct. App. Jt. App., Vol. 5, 313-14), and amply supported by record evidence.

Bethlehem Steel also takes issue with parts of George's recitation of the procedural history of the case.

George asserts that he "complained on the record about this *in absentia* process [by which the jury was selected by counsel outside the presence of the trial judge,] which had the effect of giving the employer two extra peremptory challenges." (George Pet. at 6). Most civil juries in the Eastern District of Pennsylvania are selected by counsel without the trial judge or a stenographer present, and George made no objection to that procedure in this case. George did, indeed, complain about the district court's decision to grant two challenges for cause made by Bethlehem Steel, but at no point did George object to the absence of the trial judge during jury selection.

George also suggests that he made a "request for a transcript at time of *voir dire* questions to preserve the jurors [sic] answers for appellate review." (George Pet. at 6). George, in fact, demanded that two prospective jurors who were challenged for cause be asked to re-state their answers to *voir dire* questions on the record, but at no time did George request that *voir dire* as a whole be recorded.

George avers that he "appealed to the United States Court of Appeals for the Third Circuit . . . arguing that the *in absentia* jury selection process was unconstitutional." (George Pet. at 11). George's briefs on appeal described the district court's rulings during jury selection as having been made "*in absentia*," but George did not argue to the court of appeals that the process was for that reason unconstitutional or otherwise defective. Rather, George argued only that the trial court's rulings on Bethlehem Steel's challenges for cause were erroneous on the merits, and that a reconstructed transcript of the questions and answers at issue should have been made.

ARGUMENT

I. Any asserted error during jury selection was either harmless or waived by George; and in all events, the procedures followed by the district court during jury selection were proper.

A. Procedural background.

George's Petition for Certiorari (George Pet. 18-20) argues that the district court denied George due process of law by its decisions during jury selection. *Voir dire* was conducted by counsel in Philadelphia in the presence of a deputy clerk of court and without a stenographer present, pursuant to the normal practice in the district for civil cases. *See Clerk's Office Procedure Handbook for the Eastern District of Pennsylvania*, § XXI(J)(2). At the time of *voir dire*, the district court judge was in Reading, Pennsylvania, awaiting the selection of jurors from the district's central juror pool in Philadelphia. Bethlehem Steel challenged two prospective jurors for cause, one whose claim against his employer for handicap discrimination was then pending in the same court (Ct. App. Jt. App., Vol. 8, 572-73), and another who had had a serious dispute with a former employer about which she consulted an attorney. (Ct. App. Jt. App., Vol. 8, 569-70). The district judge was advised of the basis of the challenges by the deputy clerk by telephone, and sustained both. George then asked to have each of the two excluded jurors repeat their answers for the record. That request was denied by the court, also by telephone. The next day, before the jury was sworn, George renewed his objections to the granting of challenges for cause, and again objected to the court's refusal to order transcription of the excluded jurors'

responses. The court denied the renewed objections, and explained the reasons for its rulings on the record. (Ct. App. Jt. App., Vol. 8, 570-71, 573-74).

B. The granting of a challenge for cause, even if erroneous, causes no prejudice to the party opposing the challenge, so long as the resulting jury is impartial.

This Court long ago established that the decision to grant a challenge for cause, even if erroneous, causes no prejudice to the party favoring retention of the juror, so long as the jurors who ultimately hear the case are fair and impartial. "The right to challenge is the right to reject, not to select, a juror. If, from those who remain, an impartial jury is obtained, the constitutional right of the accused is maintained." *Howard v. Kentucky*, 200 U.S. 164, 174 (1906), quoting, *Brown v. New Jersey*, 175 U.S. 172, 175 (1899). The rule applies equally in civil cases. *Northern P. R. Co. v. Herbert*, 116 U.S. 642, 646 (1886).

The requirements of due process are satisfied by the impanelling of an impartial jury even if the decision to grant a challenge for cause was error:

> [W]hile it is true, as appellant argues, that the Constitution guarantees to an accused the right to a speedy trial by an impartial jury, it does not follow that the rejection of qualified persons for insufficient cause would deprive appellant of that right; or that any useful or legitimate purpose would be served by remanding the case for a new trial before another impartial jury.

Shettel v. United States, 113 F.2d 34, 36 (D.C. Cir. 1940) (footnotes omitted); *see also, United States v. Joseph*, 892

F.2d 118, 123-24 (D.C. Cir. 1989). Various other circuits have acknowledged the same principle. *United States v. Mathews*, 803 F.2d 325, 328-29 (7th Cir. 1986), *rev'd on other grounds*, 485 U.S. 58 (1988); *Vanskike v. ACF Industries, Inc.*, 665 F.2d 188, 207 (8th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982); *United States v. Calhoun*, 542 F.2d 1094, 1103 (9th Cir. 1976); *United States v. Puff*, 211 F.2d 171, 184-85 (2d Cir.), *cert. denied*, 347 U.S. 963 (1954). *Accord, United States v. Zambito*, 315 F.2d 266, 269 (4th Cir. 1963), *cert. denied*, 373 U.S. 924 (1963). Bethlehem Steel has found no cases holding to the contrary.

George's claim of a due process violation is thus without merit. The case was tried before an impartial jury, and the district court's rulings on Bethlehem Steel's challenges for cause, even if erroneous, caused no prejudice to George.

C. The assignment of error at issue has been waived.

In all events, George has waived the claim of error he makes in this Court. Until his Petition for Certiorari, George never argued that it is error, constitutional or otherwise, for a district judge to rule upon a challenge for cause without observing the veniremen.

In the district court, George opposed Bethlehem's challenges for cause on the grounds (i) that the prospective jurors at issue had affirmed their willingness to decide the case on the basis of the evidence and instructions at trial, and (ii) that the court had failed to order the creation of a transcript of the two prospective jurors' responses. (Ct. App. Jt. App., Vol. 8, 569-74).

George's briefs in the court of appeals noted that the district court made its rulings *in absentia*, but his briefs neither suggested nor argued that the district court's unwillingness to examine prospective jurors in person was error. As was the case in the district court, George argued only that the district court's rulings on Bethlehem's challenges for cause were incorrect, and that the district court erred in failing to order the creation of a transcript, *post hoc*, of the disqualified jurors' responses.

This Court generally will not rule on issues that are raised for the first time on appeal. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *Helvering v. Wood*, 309 U.S. 344, 348-49 (1940). George's claim that the trial judge should have been present at *voir dire* has been waived.

D. The procedure by which the jury was selected was procedurally and substantively fair to both parties.

The procedures employed by the district court during jury selection were proper. Under Fed. R. Civ. P. 47(a), the court "may permit the parties or their attorneys to conduct the examination of prospective jurors . . . . " Rule 47(a) does not expressly require the continued presence of the judge during jury selection, and district courts in Pennsylvania have long followed the practice of having counsel conduct *voir dire* in the presence of a deputy clerk but without the trial judge present. *See*, Kerr, "Varieties in Jury Selection Methods," 44 F.R.D. 245, 285-86 (10th Cir. Jud. Conf. 1967) (civil *voir dire*); Local Rule 47.1 of the Western District of Pennsylvania; *cf. Stirone v. U.S.*, 341 F.2d. 253, 255-56 (3d Cir.), *cert. denied*, 381 U.S. 902 (1965)

(upholding use of the same practice in criminal *voir dire*). Similarly, the state courts in New York encourage counsel to conduct *voir dire* in civil cases in the absence of the trial judge, at least where, as here, neither party insists that the trial judge be present at all times during questioning. *See* New York *C.P.L.R.* 4107 (McKinney's 1992).[1]

The trial judge's denial of the plaintiff's request for a transcript was proper, because counsel for the parties were in full agreement about what the prospective jurors' responses had been. (Ct. App. Jt. App., Vol. 8, 569, 571-72). Moreover, a juror's recitation of what he or she said in response to *voir dire* questions is not intrinsically more reliable than the summaries of counsel, to which both sides agreed. In such circumstances, a transcript is unnecessary, and certainly not needed for effective appellate review. Indeed, the Federal Rules of Appellate Procedure expressly contemplate that federal appeals courts may review untranscribed proceedings where counsel have agreed on the contents of the record, Fed. R. App. P. 10(d); and the district court is responsible for declaring the contents of the record where agreement cannot be reached, Fed. R. App. P. 10(c).[2] The district court was

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[1] Bethlehem Steel need not address whether *voir dire* may be conducted in the absence of the trial judge where one party has insisted on the judge's presence during all phases of *voir dire*. This case does not present that issue. Nor does this case involve a question of whether the trial judge must interview jurors as to whom a challenge for cause has been made, because George did not timely request such interviews.

[2] The district court noted on the record that the plaintiff failed to request that *voir dire* be recorded. (Ct. App. Jt. App., Vol. 8, 571).

entirely justified in accepting the parties' fully consistent representations as to what had occurred at *voir dire*, and ruling on that basis.

E. The district court's rulings during jury selection were correct on the merits.

Finally, the trial judge's rulings on Bethlehem Steel's challenges for cause were correct on the merits. The district court has wide discretion in ruling on challenges for cause and will be reversed only if there is a manifest abuse of such discretion. 5A *Moore's Federal Practice*, ¶ 47.07[2], n.4 (2d ed. 1994). A prospective juror's involvement in a dispute similar to that being tried is a proper basis for granting a challenge for cause. *Vanskike v. ACF Industries, Inc., supra*, 665 F.2d at 207; *accord Consolidated Gas & Equipment Co. v. Carver*, 257 F.2d 111 (10th Cir. 1958) (new trial required where one of the jurors who participated in the verdict was a party plaintiff in a similar lawsuit). In this case, the district court carefully articulated the reasons for its rulings (Ct. App. Jt. App., Vol. 8, 570-71, 573-74), and there is no reasonable argument that the district court's decision was an abuse of the broad discretion vested in the district court in ruling on challenges for cause.

II. The district court's order *in limine* involved a routine application of settled law to the facts of this case. Review by this Court of that decision is not warranted.

The district court properly ruled that evidence about other employment decisions made by persons not

involved in the decision to terminate George's employment would not have assisted the jury in resolving George's claim of discriminatory termination. (*See* George Pet. 4a-21a). Such evidence would not have tended to show that Robert Funk, the person who terminated George, intentionally discriminated on the basis of age. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring); *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509, 545 (3d Cir. 1992), *cert. denied*, ___ U.S. ___, 114 S.Ct. 88 (1993); *Fortino v. Quasar Co.*, 950 F.2d 389, 395 (7th Cir. 1991); *Williams v. Williams Electronics, Inc.*, 856 F.2d 920, 925 (7th Cir. 1988).

The district court also correctly ruled that Bethlehem Steel's obligation under the ADEA was to avoid discrimination in the termination decision it actually made, and that the company had no obligation to permit George to "bump" younger employees or otherwise find him alternative employment. *Earley v. Champion International Corp.*, 907 F.2d 1077, 1083 (11th Cir. 1990); *Ridenour v. Lawson Company*, 791 F.2d 52, 57 (6th Cir. 1986); *Sahadi v. Reynolds Chemical*, 636 F.2d 1116, 1117 (6th Cir. 1980); *E.E.O.C. v. United States Steel*, 649 F. Supp. 964, 966 n.1 (W.D. Pa. 1986).

The district court's rulings were well within the bounds of the discretion afforded the trial court in deciding upon the admissibility of evidence. Since the court's rulings on relevance involved only the application of settled law to the special facts of this case, discretionary review of those decisions by this Court is neither necessary nor warranted.

CONCLUSION

For the foregoing reasons, Respondent Bethlehem Steel Corporation respectfully requests that the Court deny George's Petition for Writ of Certiorari.

Respectfully submitted,

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Dated: November 10, 1994

BETHLEHEM STEEL CORPORATION
SUBSIDIARY COMPANIES
Included in the Consolidated Accounts
September 30, 1994

	Name	Organized Under the Laws of	Subsidiary of Company(s)
1	BGA Drill Rig Corporation	Delaware	12
2	Belem-Administracoes e Participacoes Ltda.	Brazil	12
3	BethEnergy Mines Inc.	West Virginia	12
4	BethFargo, Inc.	Pennsylvania	12
5	Bethintermodal, Inc.	Delaware	39
6	Bethlehem Blank Welding, Inc.	Delaware	12
7	Bethlehem Development Corporation	Delaware	12
8	Bethelehem Hibbing Corporation	Minnesota	12
9	Bethelehem Industries Corporation	Delaware	12
10	Bethelehem Rail Corporation	Delaware	12
11	Bethelehem Rail Corporation	Delaware	12
12	Bethelehem Steel Corporation	Delaware	(b)
13	Bethelehem Steel de Mexico, S.A. de C.V.	Mexico	15

14	Bethelehem Steel Export Company of Canada, Limited	Delaware	12
15	Bethelehem Steel Export Corporation	Delaware	12
16	Bethelehem Steel International Corporation	Delaware	12
17	Bethelehem Steel (Thailand) Limited	Delaware	16
18	Bethelehem Structural Products Corporation	Pennsylvania	12
19	BethSystems, Inc.	Delaware	12
20	BETHTRAN, Inc.	Delaware	39
21	Cambria and Indiana Railroad Company	Pennsylvania	12
22	CARRIER EXPRESS, INC.	Delaware	20
23	Chesapeake Energy Services, Inc.	Delaware	12
24	Conemaugh & Black Lick Railroad Company	Pennsylvania	12
25	EGL Steel Inc.	Delaware	12
26	Eagle Nest Inc.	Delaware	3
27	Greenwood Mining Corporation	Pennsylvania	12
28	HPM Corporation	Delaware	3
29	Hibbing Land Corporation	Delaware	12
(c)	Hibbing Taconite Company	Minnesota	(c)
30	IPV Inc.	Delaware	12
31	Interocean Shipping Company	Liberia	12

32	Kenacre Land Corporation	Delaware	12
33	Manufacturers Water Company, The	Pennsylvania	12
34	Marmoraton Mining Company, Ltd.	Delaware	12
35	Mississippi Coatings Limited Corporation	Delaware	12
36	Mississippi Coatings Line Corporation	Delaware	12
37	Patapsco & Back Rivers Railroad Company	Maryland	12
38	Pennsylvania Steel Technologies, Inc.	Pennsylvania	12
39	Philadelphia, Bethlehem and New England Railroad Company	Pennsylvania	12
40	Primeacre Land Corporation	Delaware	12
41	South Buffalo Railway Company	New York	12
42	Steelton & Highspire Railroad Company	Pennsylvania	12

(a) 100% owned unless otherwise indicated.

(b) Parent Corporation; stock held by the public.

(c) A joint venture, 70.3083% owned by Bethelehem Hibbing Corporation, including indirect owners through Hibbing Development Company, a partnership.

BETHLEHEM STEEL CORPORATION
ENTERPRISES NOT CONSOLIDATED
(Interest owned, except where noted or indicated)
September 30, 1994

	Name	Organized Under the Laws of	Percent of Voting Securities
DIRECT OWNERSHIP – (Interest owned by Bethelehem Steel Corporation or a consolidated susidiary)			
50% or Less Owned:			
1	Chiles-Alexander International Inc.	Delaware	2.97 (a)
2	Double G Coatings Company, L.P.	Delaware	50 (j)
3	Double G Coatings, Inc.	Delaware	50 (k)
4	Empreendimentos Brasileiros de Minaracao S.A.-E.B.M.	Brazil	9.898 (b)
5	G&A Limited Partnership III - A	Texas	- (a)(20% owned)
6	Griffin-Alexander International, Inc.	Delaware	40 (a)
7	India Offshore Inc.	Delaware	40 (a)
8	Indiana Pickling and Processing Company, an Indiana General Partnership	Indiana	20 (i)
9	Iron Ore Company of Canada	Delaware	34.51 (c)
10	CENTEC Company, a Joint Venture	Pennsylvania	50 (d)

11	Precision Blank Welding, L.L.C.	Michigan	50 (i)
12	Presque Isle Corporation	Delaware	16.5
13	Scadrill, Inc.	Delaware	19
14	Walbridge Coatings, an Illinois Partnership	Illinois	- (e)(37.5% owned)
15	Rig V Limited Partnership	Delaware	- (a)(27% owned)
Over 50% Owned:			
1	Ontario Iron Company	Minnesota	90 (f)
2	Rig VI Limited Partnership	Delaware	- (a)(78.95% owned)
3	Bethlehem Singapore Private Limited	Singapore	70 (c)

INDIRECT OWNERSHIP–
(Percentage indicated with reference to direct owner's interest)

Carol Lake Company, Ltd.	Canada	100 (g)
Gulf Power Company	Canada	100 (g)
Quebec North Shore and Labrador Railway Company Inc.	Canada	100 (g)
Ratty Metals, Ltd.	Canada	100 (g)
Northern Land Company, Limited	Canada	50 (g)
Schefferville Power Company	Canada	50 (g)

Twin Falls Power Corporation Limited	Canada	49.61 (g)
Mineracoes Brasileiras Reunidias-MBR	Brazil	51 (h)

(a) Owned by BGA Drill Rig Corp.

(b) Owned by Belem-Administracoes a Participacoes Ltda.

(c) Owned by Bethlehem Steel International Corporation.

(d) Owned by Bethlehem Roll Corporation.

(e) Owned by EGL Steel Inc.

(f) Owned by Bethlehem Hibbing Corporation.

(g) Owned by Iron Ore Company of Canada.

(h) Owned by Empreendimentos Brasileiros de Mineracao S.A.-E.B.M.

(i) Owned by IPV Inc.

(j) 49% owned by Mississippi Coatings Limited Corporation, and 1% through Double G Coatings, Inc.

(k) Owned by Mississippi Coatings Line Corporation.

(l) Owned by Bethlehem Blank Welding, Inc.